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SPECIFIC PERFORMANCE OF A GUARDIAN'S CONTRACT.

KASIVASI CHIDAMBARA SWAMIGAL *v.* RAMAKRISHNA REDDIAR AND OTHERS, 47 M. L. J. 683.

In the above case the plaintiff sought specific performance of a contract entered into by the guardian of a minor for the sale of immoveable property belonging to the minor and his Lordship Justice Devadoss has held that where the contract is not vitiated by undue influence, fraud, or coercion and the guardian did not act against the interests of the minor, at the time when the contract was entered into, specific performance can be granted. This conclusion is based on the rulings in *Ramajogayya* v. *Jagannadham* (1) and *Lal Gopal Datta Chowdhury* v. *Khoroorial Majozilla Zemindary Syndicate, Ltd.* (2). The question seems to us to require further consideration. Assuming for the present, that a contract is beneficial to the minor, can the minor's guardian impose a liability on his ward by a contract for the sale of his immoveable property ? Before the Privy Council decision in *Mohori Bibi* v. *Dharmodas Ghose* (3) the High Courts in India generally held that a contract entered into by a minor was voidable and not void. But in that case the Privy Council declared such contracts to be absolutely void.

In 1911, the decision in *Mir Sarwarjan* v. *Fakhruddin* (4) laid down thus : "It is not within the competence of a manager of a minor's estate or within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property and that as the minor was not bound by the contract, there was no mutuality

1. (1918) 42 M 185 (F B).
2. (1911) 13 I C 673.
3. (1902) I L R 30 C 539 (P C).
4. (1911) I L R 39 C 232 (P C).

and hence the minor after attaining majority cannot obtain specific performance of the contract." Prior to this, there had been a conflict of opinion among the High Courts in India on the question of the applicability of the Doctrine of Mutuality here. The Specific Relief Act does not in terms refer to it but it does not expressly repudiate it either. The Privy Council when applying this doctrine in *Mir Sarwarjan* v. *Fakhruddin* (4) do not make any reference to the question of necessity or benefit to the minor, nor do they seem to make any distinction between "purchase" for a minor and "sale" on behalf of a minor. In the consideration by the Courts in India of the scope and effect of this decision, the following are certain aspects of the question decided :—

1. Contracts entered into by statutory guardians for purchase or sale of minor's property are not affected by the Doctrine of Mutuality. [See *Babu Ram* v. *Said-un-nissa* (5), *Mussammat Etwaria* v. *Chandra Nath Mukherjee* (6) and *Innatunnessa Bibi* v. *Janaki Nath Sarkar* (7)].

2. Contracts entered into by managers of joint Hindu families to sell immoveable property on behalf of the family and for purposes binding on the family have also been held to be enforceable against the minor members of the family whether during the lifetime of the manager or after his death. [See *Hari Charan Kuar* v. *Kaula Rai* (8), *Velayudham Pillai* v. *Perumal Naicker* (9) and *Narayanan Chetty* v. *Muthiah Chetty* (10)]. In *Hari Charan Kuar* v. *Kaula Rai* (8) Chamier, C. J., observes :—"The decision of their Lordships in the cases of *Mohori Bibi* v. *Dharmodas Ghose* (3) and *Mir Sarwarjan* v. *Fakhruddin* (4) do not apply to contracts made by managing members of joint Hindu families for the benefit of the family. Such contracts can be enforced on behalf of the family by the persons who make them......................Contracts made not by minors, but by persons who have power to make contracts on behalf of a joint family do not appear to come within those decisions. I am not prepared to discuss this suit for specific performance on the ground that the contract lacks mutuality, having been made by or on behalf of minors who

3. (1902) I L R 30 C 539 (P C).
4. (1911) I L R 39 C 232 (P C).
5. (1913) I L R 35 A 499.
6. (1905) 10 C W N 763.
7. (1917) 22 C W N 477.
8. (1917) 2 P L J 513 (F B).
9. (1915) 31 I C 811.
10. (1924) 46 M L J 575.

are not competent to contract." In *Narayanan Chetty* v. *Muthiah Chetty* (10) His Lordship Justice Ramesam refers to the observations of their Lordships in *Bappu* v. *Annamalai Chettiar* (11) and *Krishna Aiyar* v. *Shamanna* (12) and distinguishes them as they are *obiter dicta*, and holds that a contract entered into by a manager to sell immoveable properties can be specifically enforced against the surviving members of the family who are minors. The same view was expressed by Coutts Trotter and Seshagiri Aiyar, JJ. in *Venkateswara Aiyar* v. *Raman Nambudri* (13).

3. A distinction has been drawn between executed contracts and executory contracts and all the three learned Judges in the Full Bench case in *Raghava Chariar* v. *Srinivasa Raghava Chariar* (14) state and emphasize the distinction. They hold that an executed contract can be enforced by or on behalf of a minor, as there are no more consensual obligations imposed on the minor. A similar view was expressed in *Walidad Khan* v. *Janak Singh* (15), *Bhaggabhor Mondal* v. *Mohini Mohan Banerjee* (16) and *Madhab Koeri* v. *Baikuntha Karmaker* (17). In *Madhab Koeri* v. *Baikuntha Karmaker* (17) their Lordships draw a distinction between executory contracts and executed contracts, distinguish the Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin* (4) and observe :—"That *Mir Sarwarjan* v. *Fakhruddin* (4) was clearly a case where the contract was one imposing obligations on the minor which could not be enforced by the defendant and consequently a lack of mutuality put it out of the minor's power to enforce the contract. In the case now under consideration, no question arises, or can arise as to any obligation to be performed by the minor arising out of the contract."

Putting aside for the present these three classes of cases, the question remains whether an executory contract for sale of immoveable property belonging to a minor entered into by his guardian (who is not a joint family manager) can be specifically enforced against the minor. The Privy Council decision in *Mir Sarwarjan* v. *Fakhruddin* (4) seems to lay down (though not in such terms)

4. (1911) I L R 39 C 232 (P C).
10. (1924) 46 M L J 575.
11. (1922) 44 M L J 226.
12. (1912) 23 M L J 610.
13. (1916) 19 M L T 329.
14. (1916) I L R 40 M 308 (F B).
15. (1913) I L R 35 A 370.
16. (1916) 33 I C 994 (Cal)
17. (1919) 52 I C 338 (Pat.)

that such a contract cannot be enforced against the minor as there is no mutuality between the parties, and as the enforcement of such a contract would impose a personal liability on the ward. The same principle can be gathered from the observations in the following cases :—

In *Raghava Chariar* v. *Srinivasa Raghava Chariar* (14) his Lordship Justice Abdur Rahim observes at page 320 : "There are cases however in which the question of mutuality arises and these stand on a different footing. For instance, if an infant seeks to enforce a contract for sale of immoveable property, the Court of Equity will refuse to grant specific performance, as it could not enforce any engagement entered into by the minor, and there would thus be a want of mutuality. *Mir Sarwarjan* v. *Fakhruddin* (4)."

Next we have the decision in *Narayana Row* v. *Venkatasubba Row* (18) in which their Lordships Justice Spencer and Justice Bakewell, following the Privy Council ruling in *Mir Sarwarjan* v. *Fakhruddin* (4) observe at p. 79 : "The answer to this [an attempt to distinguish *Mir Sarwarjan* v. *Fakhruddin* (4)] is that the want of mutuality between the parties to the suit and not any want of validity in the guardian's appointment was the ground of Lord Macnaughten's decision."

In *Pramila Bali Das* v. *Jogesher Mandal* (19) it was held on the principles laid down in *Mohori Bibi* v. *Dharmodas Ghose* (3) and *Mir Sarwarjan* v. *Fakhruddin* (4) that a lease in favour of a minor which imposes a liability upon the minor is null and void and cannot confer any right or title upon him.

In *Narayanan Chetty* v. *Muthiah Chetty* (10), his Lordship Justice Ramesam observes at p. 578 : "The case where the contract is made on behalf of a minor or minors is settled by the decision in *Mir Sarwarjan* v *Fakhruddin* (4) . . I think this decision also covers this case where a joint family consists of minors only and therefore has no manager and a guardian of all the minors, who is *ex hypothesi* not manager, not being member of the family but is merely their guardian, enters into a contract on behalf of some or all of the minors, whatever the nature of the contract may be."

3. (1902) I L R 30 C 539 (P C). 14. (1916) I L R 40 M 308 (F B).
4. (1911) I L R 39 C 232 (P C).
10. (1924) 46 M L J 575.
18. (1919) 38 M L J 77. 19. (1918) 3 P L J 518 : 46 I C 670.

There is an older decision of the Privy Council in [*Waghela Rajsanji* v. *Shekh Masluddin* (20).] which holds that a guardian cannot contract in the name of a ward so as to impose on him a personal liability.

Turning to *Chidambara Swamigal* v. *Ramakrishna Reddiar* (21) we find his Lordship Justice Devadoss relying on the two decisions reported in *Ramajogayya* v *Jagannadhan* (1) and *Lal Gopal Datta Chowdhury* v. *Khorooriah Majozilla Zemindary Syndicate, Ltd.* (2). In the former case the facts were quite different and the decision of the majority of the Full Bench was that " no decree should be passed against the minor or his estate, on a contract entered into on his behalf by a guardian, except in cases in which the minor's estate would have been liable for the obligation incurred by the guardian under the personal law to which he is subject. " The opinion was guardedly expressed and his Lordship Justice Seshagiri Aiyar does not propose to lay down in that decision that a personal and onerous executory contract can be entered into by a guardian for the sale of immoveable properties of his ward.

In *Lal Gopal Datta Chowdhury* v. *Khorooriah Majozilla Zemindary Syndicate, Ltd.* (2) it was no doubt held on the authority of *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (22) that when a guardian entered into an agreement on behalf of a minor, and it was to the minor's benefit, it could not be repudiated by him, if subsequently he found he could obtain more money. But the decision of the High Court in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (22) was overruled by the Judicial Committee in *Mir Sarwarjan* v. *Fakhruddin* (4) and hence the decision in *Lal Gopal Datta Chowdhury* v. *Khorooriah Majozilla Zemindary Syndicate, Ltd.* (2) cannot be relied on as good law.

Even on the question of benefit to the minor the decision in *Chidambara Swamigal* v. *Ramakrishna Reddiar* (21) seems open to question, as the sale in favour of the third defendant was really beneficial to the minor, in that, he could get more money under it. The very fact that the guardian of the minor repudiated the contract in favour

1. (1918) 42 M 185 (F B). 2. (1911) 13 I C 673.
4. (1911) I L R 39 C 232 (P C). 20. (1887) I L R 11 B 551 (P C).
21. (1924) 47 M L J 683. 22. (1906) I L R 34 C 163 (F B).

of the plaintiff and sold the properties to third defendant for a higher price showed that the contract in favour of the plaintiff was detrimental to the minor. His Lordship at p. 685 observes : "To hold that a Court should not grant specific performance of a valid contract if better terms are forthcoming would be putting a premium upon offers of a better price a long time after the contract is entered into." We doubt if this is the correct principle in the case of contracts on behalf of minors. It may be noted in this connection that his Lordship Justice Devadoss wrote a concurring judgment in *Bappu* v. *Annamalai Chettiar* (11).His Lordship Justice Phillips who observes at p. 231 : "There is another broad principle of equity upon which the refusal to allow specific performance can bebased and that is that when one of the parties is a minor, a Court will not compel him to do anything unless it is satisfied that such act is for the benefit of the minor. It is argued that it has not been shown that this contract would be detrimental to the minor, but that is not sufficient, for, if there is any possibility of there being any detriment, the Court will require to be satisfied that the possibility no longer exists before it takes action. For this reason also, I think the contract could not be enforced against the fourth defendant."

Neither the Privy Council decisions in *Mir Sarwarjan* v. *Fakhruddin* (4) and *Waghela Rajsanji* v. *Shekh Masludding* (20) and the Doctrine of Mutuality nor the decisions in *Bappu* v. *Annamalai Chetty* (11) or *Narayanan Chetty* v. *Muthiah Chetty* (10) were quoted before his Lordship, and the decision based on *Lal Gopal Datta Chowdhury* v. *Khorooriah Majozilla Zemindary Syndicate, Ltd.* (2) [which must be deemed to have been overruled by *Mir Sarwarjan* v. *Fakhruddin* (4)] cannot, it seems to us with due deference, be accepted as good law.

E. L. NARASINGA RAO, B. L.

2. (1911) 13 I C 673. 4. (1911) I L R 39 C. 232 (P C).
10. (1924) 46 M L J 575. 11. (1922) 44 M L J 226.
20. (1887) I L R 11 B 551 (P C).

SUMMARY OF ENGLISH CASES.

ANGLO-BALTIC AND MEDITERRANEAN BANK *v.* BARBER AND COMPANY, (1924) 2 K B 410.

Company—Voluntary liquidation—Decree against—Stay of execution—Subsequent recovery of damages—If enures to decree-holder—Practice.

The manager of a Company fraudulently put his employer's name to some bills of exchange for which the Company received no consideration and on the basis of the bills an action was brought against the Company. Pending the same the Company went into voluntary liquidation. The liquidator thereafter submitted to judgment for the amount claimed. Subsequently the Company sued a third party for facilitating their manager in committing the fraud in respect of which they had been made liable and obtained a decree for damages, whereupon the decree-holder whose judgment against the Company had not been satisfied obtained a garnishee order *nisi* attaching the damages awarded to the Company. The liquidator applied for stay of execution of judgment. *Held,* the general practice is to stay execution where a Company is in voluntary liquidation, because the execution, if allowed, would necessarily interfere with the distribution of the assets *pari passu.* The result of the Company's obtaining damages did not either in law or in equity enure for the benefit of the judgment-creditor solely but was to be divided rateably among all creditors. S. 186 of the Companies Act relied upon.

WHELAN *v.* HENNING, (1924) 2 K. B. 421.

Income-tax—Foreign possessions—Shares—Income from—Basis of assessment—Income-tax Act, 1918, *Sch. D, Case V, R.* 1.

A person who possessed shares in a Company in Ceylon received dividends in England in respect thereof for three years. For the fourth year no dividend was declared, but he was sought to be assessed under Sch. D, Case V on the average dividend for the three preceding years. *Held,* the liability to pay income-tax depends not on the possession of shares in the year of assessment but upon the receipt of profit in that year. In the absence of such receipt there was no liability to pay income-tax. (1921) 2 A. C. 222 followed.

BACK *v.* DANIELS, (1924) 2 K. B. 432.

Income-tax—Lands leased to grow potatoes—Occupation of lands—Profits made by lessee by sale of potatoes—Assessment—Basis of—Sch. B or Sch. D, Income-tax Act, 1918.

Certain merchants dealing in potatoes took out on annual lease lands for growing potatoes. The owner was to be paid rent, and in addition, was to supply labour, for which also so much per acre was paid. *Held,* in respect of profits made by sale of potatoes, the merchants would be assessable under Sch. B as persons in occupation of lands and not under Sch. D of the Income-tax Act, 1918.

BUTWICK *v.* GRANT, (1924) 2 K. B. 483.

Principal and agent—Extent of agent's authority—Sale of goods—Right to receive payment of price.

There is no hard and fast rule of law that an agent employed to sell has necessarily power to receive the price. In an action by the seller of goods against the buyer for the price, it would be open to the latter who had paid the agent to show either that the agent had actual authority to receive payment, or that he had ostensible authority to receive payment or that he had a customary authority by reason of the fact that the payment was made to him in the ordinary course of the business of agencies of the kind in question.

BAXENDALE *v.* MURPHY, (1924) 2 K. B. 494.

Income-tax—Trustee under a settlement—Provision for remuneration—If an employee—Liability to tax—Income-tax Act, 1918, *Sch. D, Case II.*

Under the terms of a deed of settlement, a person was appointed trustee and out of the income arising from the trust funds he was to draw out $100 per annum as remuneration. *Held,* he is in no sense an employee and as such it did not amount to remuneration in respect of any employment, and he could not be taxed under Sch. D, Case II of the Income-tax Act. The amount was only an annual payment falling within Case III, R. 1.

FOOKS *v.* SMITH, (1924) 2 K. B. 508.

Marine Insurance—Loss of goods—Constructive loss followed by actual loss—No notice of abandonment for several years—Liability of underwriter.

Where by a peril insured against, there is a constructive total loss and no notice of abandonment is given, then if in the ordinary course of an unbroken sequence of events following upon the peril insured against the constructive loss becomes an actual total loss—*e. g.*, capture followed by confiscation—the underwriter is liable in respect of the total loss. If, however, the total loss is not the result of a sequence of events following in the ordinary course upon the peril insured against but is the result of some supervening cause, the underwriter is not liable. It is an illustration of the doctrine *proxima causa non remota spectatur.*

Goods insured against loss by restraint of princes were being carried in an Austrian ship. Before the voyage was completed on account of the imminence of war, the goods were landed on the way, the voyage being abandoned. No notice of abandonment was given and subsequently the Austrian Government requisitioned the goods for war purposes. *Held,* there was an original constructive total loss when in the middle of the voyage the goods were abandoned, but as no notice was given for an unreasonable period of five years, a cause of action against the underwriters could not be based on that loss. The subsequent confiscation was an actual total loss, but it was not the necessary and direct result of the original peril, the restraint of princes, and hence would not afford a cause of action against the underwriter.

JONES *v.* JONES, (1924) P. 203.

Husband and wife—Separation order—Resumption of co-habitation—Subsequent desertion—If possible in law.

So long as an order of separation between husband and wife remains undischarged, a husband cannot be guilty of desertion in the eye of law. Even if the spouses co-habit after the order, that does not *ipso facto* result in a discharge of the separation order, and as the husband was not bound to co-habit, he could not be guilty of desertion.

NOT TO BE REMOVED
DEPARTMENT OF LAW

THE CHRISTEL VINNEN, (1924) P. 208.

Shipping—Damage to cargo—Vessel unseaworthy—Defective rivet—Exemption clause in Bill of Lading—How far a defence.

Exceptions in a Bill of Lading do not apply to protect a shipowner who furnishes an unseaworthy ship where the unseaworthiness causes damage, unless the exceptions are so worded as clearly to exclude or vary the warranty of seaworthiness. One of the exceptions in a Bill of Lading was for " any latent defects in hull. " There was a defective rivet and this allowed water to flow in and damage the cargo. In a suit for damages, *held,* the exception clause did not qualify the implied warranty of seaworthiness and the shipowner was liable for the whole loss.

In re, NATIONAL BENEFIT ASSURANCE COMPANY, LIMITED, (1924) 2 Ch. 339.

Company—Life insurance policy—Mortgage of—Winding up—Set off, if allowed—Bankruptcy Act, 1914, *S.* 31.

A person who had effected life insurance in a certain Company mortgaged his policy to the Company and borrowed some money. Prior to his death, the Company was wound up and the policyholder claimed to set off the mortgage debt against the value of his policy. *Held*, he was entitled to do so, as they were both contractual obligations which could be proved under S. 31 of the Bankruptcy Act. Case-law discussed.

In re, ENGELBACH'S ESTATE : TIBBETTS *v.* ENGELBACH (1924) 2 Ch. 348.

Insurance—Life policy—Money payable to daughter if alive at the end of term of years—Death of policyholder within period—Policy amount if part of the estate of deceased—Trust.

A policy of insurance was taken out by a man and it was stated therein that at the end of the period fixed the amount was to be paid over to his daughter if she was then alive. The assured died before the expiry of the period fixed. *Held,* the policy amount belonged to the estate of the assured and should be paid to his executors. There was no

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legal estate vested in the daughter and being no party to the contract she could not sue thereon, nor could the assured be said to have constituted himself a trustee for his daughter. (1892) 1 Q. B. 147 followed.

In re, BALEN AND SHEPHERD'S CONTRACT, (1924) 2 Ch. 365.

Vendor and purchaser—Abstract of title—Recitals in one of the title deeds—When binding—Incomplete abstract—If entitles vendee to rescind.

In the abstract of title furnished by a vendor, the title to the properties was traced to one X, and after his death his administrator conveyed the properties to one Y by deed, reciting therein that Y had become entitled to the properties in equity. The vendee wanted to be satisfied how Y became entitled in equity. *Held*, the vendee was entitled to go behind the recital as to Y's title, as the recital by the administrator would not bind the heirs of X; but reasonable opportunity should be given to the vendor to supply a complete abstract of title and the vendee was not entitled to rescind the contract then and there on the basis of defect in title.

The principle entitling a vendor to rely upon a recital to the effect that a grantee to whom the property is conveyed is entitled in equity rests on this, that where a grantor is on the face of the abstract entitled legally and beneficially, he can admit and is bound by a recital of the equitable title of his grantee and that a purchaser taking from the grantee or his successors in title is not bound to inquire as to the instruments, acts in the law, and events which found the grantee's equitable title, and getting the legal estate will not be affected with notice of any adverse equitable claim if in fact the grantee's equitable title was defective.

DUFF DEVELOPMENT COMPANY, LTD. *v.* GOVERNMENT OF KELANTAN, (1924) A. C. 797.

Sovereignty—Status—Letter of Secretary of State—If conclusive in a Court of law—Waiver—What amounts to—Submission to arbitration—Effect of.

Under an agreement between the Kelantan Government and an English Company, disputes arising thereunder were to

be settled by arbitration and one such dispute was referred to arbitration. The Kelantan Government applied to the Chancery Division to have the award set aside, but were unsuccessful there, as well as in the Court of Appeal and the House of Lords. Thereafter the Company applied to the King's Bench to enforce the award, when the Government claimed immunity as a Sovereign State. On a requisition from the Court, the Secretary of State for the Colonies informed the Court that the Kelantan Government was an independant Sovereign State. *Held,* it is the settled practice of English Courts when a question of sovereignty is raised to take judicial cognizance of the status of a foreign State, and in cases of uncertainty to seek information from a Secretary of State, which would be conclusive on the matter. *Rationale* of the rule and tests of sovereignty explained.

Held also by the majority of the House of Lords (Lord Carson dissenting) neither the agreement to submit disputes to arbitration, nor appearing before the arbitrator, nor the attempts made to set aside the award in the English Courts amounted to a submission to the jurisdiction of the Court and as such the objection of Sovereign State could be raised in defence.

History of the law regarding enforcement of awards set out by Viscount Finlay.

The question whether a foreign Sovereign who submits to judgment thereby submits to execution under the judgment upon the property in England left open.

LEEDS INDUSTRIAL CO-OPERATIVE SOCIETY, LTD. *v.* SLACK, (1924) A. C. 851.

Easement—Ancient lights—Obstruction threatened by putting up building—Power to award damages in lieu of injunction.

Held, by a majority of the House of Lords (*Lords Sumner and Carson dissenting*) that the Court of Chancery has jurisdiction to award damages in lieu of granting an injunction in the case of an obstruction to ancient lights which is being threatened by the raising of a new building. The fact that no obstruction had as yet taken place does not limit its jurisdiction to the grant of an injunction. 43 Ch. D. 316 disapproved and (1923) 1 Ch. 431 reversed.

OFFICIAL RECEIVER AND LIQUIDATOR OF JUBILEE COTTON MILLS, LIMITED *v.* LEWIS, (1924) A. C. 958.

Company—Winding up—Promoter making secret profits—Liability to make good to Company—Certificate of incorporation—If conclusive as to date—No prospectus issued—Allotment of shares before filing statement—Validity—Companies (Consolidation) Act, 1908.

The certificate of incorporation of a Company is conclusive as to the date on which it states the Company was incorporated and allotment of shares on that day is valid irrespective of whether it was made before the Company came into existence.

Where the promoter of a Company had been allotted a large number of shares to provide for promotion profits even before a statement in lieu of prospectus was filed but he transferred them to another and realized a considerable sum, he was bound to account to the Company, or in cases of winding up to the liquidator, for the profits he had made.

Where no prospectus is issued and before a statement in lieu of the prospectus is filed, allotment of shares is made, *held,* per Lord Sumner (Lord Dunedin holding *contra*) the allotment is not wholly void.

MAYSON *v.* CLOUET, (1924) A. C. 980.

Vendor and purchaser—Agreement to pay deposit and the balance in instalments—Forfeiture of deposit in case of default—Rescission by vendor—Instalments if can be recovered.

A contract to sell land provided for an initial deposit and the payment of the balance in three instalments, the last being payable on a certain certificate being produced. There was a clause for forfeiture of the deposit in cases of default. The deposit was made and all the instalments were duly paid except the last one and the vendor after producing the certificate claimed the last instalment within a certain time. As it was not complied with, he rescinded the contract, whereupon the vendee sued for return of the instalments he had paid. *Held,* the contract made a clear distinction between deposit and instalments and as it was only the former that was made forfeitable, the instalments paid could be recovered.

HETHERINGTON *v.* SECURITY EXPORT COMPANY, LTD., (1924) A. C. 988.

Certiorari—*Writ when can issue—Ministerial and judicial acts.*

A writ of *certiorari* will not lie against an act which is purely ministerial. If the issue of a distress warrant involves a judicial act, it is subject to the procedure by which an excessive exercise of jurisdiction can be challenged; but if it is mere ministerial act following on the exercise of powers possessed by other people, then the writ of *certiorari* is not the proper remedy to apply.

JOTTINGS AND CUTTINGS.

Law Officers and Judgeships.—If the rumour that Sir Thomas Inskip will be one of the new King's Bench Judges should prove to be true, he will be the first Law Officer to accept a puisne judgeship for many a long day. Nearly half a century ago Lord Esher and Sir Henry Keating did not deem it unbecoming in a Solicitor-General to start a judicial career as a judge of first instance; but no other Law Officer has since displayed a similar desire for the less exalted places of the Bench. Occasionally a vacancy in the Court of Appeal has been filled by a Law Officer. Sir Horace Davey and Sir John Rigby, for instance, abandoning their ambition to occupy the Woolsack, were content to become Lords Justices. But even a Lord Justiceship would appear to have lost its attractiveness for a Solicitor-General. There is, at any rate, not a single ex-Law Officer among the present Lords Justices. The only ex-Law Officers now engaged in judicial work, apart from the Lord Chancellor and the ex-Lord Chancellors, are Lord Hewart, who is Lord Chief Justice, Sir Ernest Pollock, who is Master of the Rolls, and Lord Carson, who is a Lord of Appeal. The modern disinclination of Law Officers to accept puisne judgeships is, perhaps, a matter for regret. It might be urged that it tends to impair the dignity of the office of a High Court Judge. What, perhaps, may be said more confidently is that it is not always fitting that men should occupy the foremost places in the judicial world without having acquired some experience of the Courts below. At the present time there are two Lords of Appeal—Lord Sumner and Lord Blanesburgh—who have served both as puisne Judges and as

Lords Justices, but not many years ago it happened that there was not a single Lord of Appeal who had ever sat in the Courts from which came the appeals which the House allowed or dismissed. If, then, Sir Thomas Inskip should become one of the new King's Bench Judges, his appointment will be none the less welcome because it is so rare for a Law Officer to become a High Court Judge.

—*The Law Journal*, 22nd November, 1924, p. 719.

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The Attorney-General and the Cabinet.—We make a further reference to the inclusion of the Attorney-General in the Cabinet only to express our appreciation of the support which Sir Harry Poland, the 'grand old man' of the profession, has, in a characteristic letter to the *Times*, given to the views expressed in these columns last week. The letter is welcome not merely because it emphasises the view that it is undesirable, on constitutional grounds, that the Attorney-General should be a member of the Cabinet, but also because it shows that Sir Harry Poland continues, in his ninety-sixth year, to take a keen interest in the affairs of the profession of which he has been a member for seventy-three years. Sir Harry Poland aptly points out that some of the most famous Law Officers of modern times, such as Sir Hugh Cairns and Sir Roundell Palmer, though conspicuous as statesmen, were never made Cabinet Ministers. To the names he mentions he might appropriately have added that of Sir Henry James, who was a very prominent figure in the House of Commons in the eighties. The growing practice of including the Attorney-General in the Cabinet—where, be it remembered, the Lord Chancellor fills the position of a 'Minister of Justice'—has, indeed, neither the authority of precedent nor the sanction of convenience.

—*The Law Journal*, 22nd November, 1924, p. 719.

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Bankruptcy Law and Fraudulent Debtors.—It is stated that the Committee appointed some months ago by the late Government to consider a reform of the Bankruptcy Laws have come to the conclusion that some drastic alterations of the law are required to check the practices of fraudulent debtors. The cases in which it is found that fraudulent bankrupts

have failed to keep books are said to be very numerous, and there is a suggestion that the penalties of the bankruptcy law for failing to keep proper accounts might well be strengthened. It is also said that the Committee are considering an amendment of the Company Laws to prevent bankrupts from carrying on business under the guise of a limited liability Company. There are provisions in the present bankruptcy law which interfere with the commercial activities of an undischarged bankrupt who wants to trade as an individual—provisions the breach of which exposes the bankrupt to severe penalties. There is nothing to prevent him from setting up a company whose trading is not hampered by his antecedents. The artifices of the fraudulent bankrupt are many and ingenious, and however stringent the law be made, he will find means of evading some of its provisions. The most that can be hoped from alterations of the law is that the opportunities for committing frauds will be confined within narrower bounds.

—*The Law Journal,* 22nd November, 1924, p. 721.

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The Birth Control Case.—The action which Dr. Marie Stopes brought against Dr. Sutherland for a libel contained in his criticism of her conduct of a birth control clinic in London has ended in the House of Lords (21st November) in a victory for the defendant. The jury had found, in answer to questions left to them by the Lord Chief Justice, that the words complained of were true in substance and in fact; also that they were not fair comment. There was no specific distinction made in the questions between statements of fact and statements of opinion ; but the case was dealt with both in the Court of Appeal and in the House of Lords on the footing that the meaning of the findings was that the words were true so far as they consisted of statements of fact, and unfair comment so far as they were expressions of opinion. On this assumption the Court of Appeal took the view that the plaintiff was entitled to the damages awarded by the jury, and *prima facie* one would think either that this was right, or that there ought to have been a new trial on the ground that by reason of misdirection the issue of fair comment had not been fairly left to the jury. In the House of Lords, however, Lord Wrenbury alone took this view. The other noble Lords were of opinion that, assuming that the charges made by the defendant against the plaintiff were true, as the

jury had found they were so far as they were statements of fact, they were so serious that no jury could reasonably have found that the comments actually made were unfair. The case is a very strong example of the rule that it is for the Court to say whether a criticism relating to a matter of public interest is reasonably capable of being interpreted as libellous in that it travels beyond the limit of fair criticism.

—*The Law Journal,* 29th November, 1924, p. 736.

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Punishment before Trial.—Not always is the law, in W. S. Gilbert's familiar phrase, 'the true embodiment of everything that's excellent.' At times it can itself be Gilbertian, as when it results in accused persons being punished before they are converted instead of afterwards. Such an instance occurred at the Kent Assizes on Monday, when a man pleaded 'guilty' to forging endorsements of two cheques for £1-13-5 and £2-14-6, and, having been detained in prison some three months awaiting trial, was sentenced to three days' imprisonment, which meant, of course, his immediate discharge. Not unfittingly, Mr. Justice Swift described the long detention of this untried prisoner as 'a very improper and a very disgraceful thing.' It appeared that the magistrates, in committing the man for trial, consented to accept bail, himself in £50 and a surety in a like sum, but that he was unable to find a surety. For three months and more, therefore, this man was kept in gaol 'not because there was any fear of his not turning up at the Assizes, but because he had not a friend who was prepared to become bail in £50.' If feelings of humanity do not always prompt magistrates to give reasonable bail in such cases, they might sometimes remember that the expense to the State, in keeping such offenders unnecessarily in prison, is considerable. Some three years ago a committee, of which Mr. Justice Horridge was chairman, was appointed to consider the long detention of untried prisoners, and among the reforms the Committee recommended was 'the granting of bail in every possible case where it can reasonably be done.' The spirit of the recommendation was certainly not observed by the magistrates in the case before Mr. Justice Swift. But the whole of the blame does not rest with the magistrates. The Circuit arrangements are also responsible. A system under which men or women, whether guilty or innocent, and whether on bail

or not, are kept for three or four months with criminal charges hanging over their heads is obviously in need of reform.

—*The Law Journal,* 29th November, 1924, p. 736.

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The Bank Case.—For obvious reasons we do not propose to comment at any length upon the case of *Robinson* v. *Midland Bank, Ltd.*, which for nearly a fortnight occupied the attention of Lord Darling and a special jury—and occupied also, to a large degree, the minds of the public. At one time it seemed that more than one point of considerable legal interest might arise ; but the jury's findings of fact left the legal position, as between the plaintiff and the defendants, fairly clear. The trial will, of course, take rank amongst the most famous of *causes celebres ;* it joins the category of trials such as the Tichborne suit and the case of 'Madam Rachael,' whilst for sheer sustained dramatic effect it is probably true to say it has hardly ever, if at all, been surpassed.

—*The Law Journal,* 6th December, 1924, p. 747.

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Doctors, Lawyers, and the Poor.—The Attorney-General, at the annual dinner of the Royal Society of Medicine, on 26th November, made some observations on the way in which the needs of the poor were respectively dealt with by the medical and the legal professions. As reported in "The Times," he said that 'there was one respect in which doctors set lawyers a great example. That was in the immense amount of voluntary work which the medical profession was glad to render in hospitals and elsewhere to give health to those who could not afford to pay for it. During his tenure of office as Attorney-General he had seen many cases in which the poorer people of this country needed free legal assistance almost as badly as they needed medical assistance, and he should have been proud if his profession could claim the same record of voluntary and ungrudging service as that which the medical profession rendered to that class day by day. As our readers know, we have often urged that the provision of advice and assistance to those unable to pay for it is a duty cast upon the legal profession by reason of the fact that they enjoy a monopoly of giving such advice and assistance, and we believe that our views on the subject are those

of the vast majority of the profession, and that a great deal more is done, quietly and unostentatiously, in that regard, than is at all realised. But if, as would appear, Sir Douglas Hogg's suggestion is that the duty owed by the medical profession to the sick poor is in any way analogous to that owed by lawyers to the poor person desirous of legal advice and assistance, we must respectfully, but definitely, beg to differ. In the first place, the doctor owes a great part of his ability to earn his living by the practice of his profession to the fact that he gains his training in hospitals which are maintained out of funds contributed by the public, whereas no such consideration applies to the lawyer. Further, the doctor who is in practice, and who attends at a hospital at times previously arranged, incurs no expense in respect of his service either for offices, materials or assistance, clerical or otherwise, and, indeed gains the benefit, however eminent he may be, of experience in diagnosis and in the conduct of operations. If the task of the lawyer in dealing with poor persons were in any degree comparable to that of the doctor, there would be no problem to solve with regard to legal assistance to the poor. So far as what may be described as 'out-patient' work—the giving of advice to persons who come for it and who require nothing more—is concerned, the problem is to a large extent solved by the numerous 'Poor Man's Lawyers' throughout the country. But, when litigation or complicated negotiation on behalf of a poor person is necessary, the solicitor is faced with heavy and responsible work which, in ninety-nine cases out of a hundred, teaches him nothing, which occupies a good deal of his time and that of the clerks whom he pays, and which may involve him in not inconsiderable out-of-pocket payments. Space will not permit of our enlarging now on this matter, or on the many other points which make the question facing the lawyer quite different from that affecting the doctor; but, whilst recognising to the full the claims of the poor on both doctors and lawyers, it seems to us that any attempt to draw an analogy between the medical and the legal profession in this regard, or to make comparisons between the methods of discharging their obligations, may hinder rather than help the solution of a very difficult problem.

—*The Law Journal*, 6th December, 1924, p. 748.

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Congestion in the French Law Courts.—According to the Paris correspondent of the "Daily Telegraph," the work of the

Paris Court of Appeal has fallen very seriously into arrear, and it is found that the situation is growing worse day by day. At the present moment there are over 14,000 cases for which the Court has not yet been able to assign a date of hearing, and this number is steadily growing, since every day more appeals are entered than are dealt with. According to a statement made by the Minister of Justice, some of the cases have been on the waiting list for four years, and a delay of two years is about the average. In some cases litigants, despairing of ever having their business settled by the Courts, have composed their differences by mutual arrangement—a procedure which the Minister points out results in a considerable loss to the Treasury. In order to remedy this state of affairs the Minister proposes to reduce the number of Judges from five to three in each chamber of the Appeal Court, which would enable two additional chambers to be opened without any increase in the number of Judges. Unless this or some other step is taken to expedite legal business the average delay in the Court of Appeal will soon be not two years, but three.

—*The Law Journal,* 6th December, 1924, p. 765.

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The 'Poor Persons' Proposals.—We make no apology for returning again, albeit briefly, to the subject of the provision of legal advice and assistance to those unable to pay for it. The matter is one of the most important—indeed, we think we should properly say the most important—of the questions with which the profession is faced. Its seriousness lies not merely, or even chiefly, in the fact that its solution involves the undertaking by both branches of the profession of a large and increasing amount of purely honorary work, involving the sacrifice of time which might in most cases be more profitably—from a pecuniary point of view—employed. In our opinion, the real importance of the question, and the urgency of getting it settled at the earliest possible moment, lies in the fact that the matter is one profoundly affecting the relations of the profession both with the State and with the public—with the State because it has created a monopoly of an essential service, and with the public because some of its members have need of that service, but have not the means to avail themselves of it in the ordinary manner. The position was admirably expressed in the Presidential address of Mr. David MacIver to the Incorporated Law Society of

Liverpool, a report of which appears on another page. His address and the report of the society are of particular interest in this connection, in that they contain what appears to be an 'inspired' forecast of the recommendations to be made by Mr. Justice Lawrence's Committee, which has for more than a year been considering this question. The report of this committee may, it is understood, be shortly expected. The main points appear to be the decentralisation of divorce work, which at present forms by far the greatest part of the legal assistance in civil litigation required by 'poor persons,' by giving the District Registrars jurisdiction in their respective districts, and the abolition of the present Poor Persons' Department and the casting upon committees, to be established in certain centres, of the work at present performed by that Department. We must reserve detailed consideration of these and the committee's other proposals until the report is published, but we have no doubt that the local consideration of the applications of poor persons will be a great improvement on the present system. The terms of reference to the committee do not, of course, enable them to deal with the whole 'Poor Persons' question, which includes the giving of advice in matters not involving litigation, and the defending of persons accused criminally. It will be remembered that the Bishop of London, and other leaders of religious thought, have urged the necessity for a public enquiry into this question in a letter, on which we commented a fortnight ago. *Solvitur ambulando*; a satisfactory answer to the problem set to Mr. Justice Lawrence's Committee would be a great advance in the right direction, and would, we think, materially assist in the ultimate solution of the whole of an extremely difficult and anxious problem.

—*The Law Journal*, 13th December, 1924, p. 767.

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Political Prosecutions and the Cabinet.—It is satisfactory to find that the view taken by the present Government as to the duties of the Attorney-General with regard to the institution of political prosecutions in which matters of public policy are involved, is acquiesced in by the late Prime Minister, and, presumably by his colleagues. It will be remembered that on the 11th instant, Mr. Baldwin announced that the Cabinet had rescinded an instruction of the late Government to the effect that no political prosecution was to be commenced by

the Attorney-General without the previous sanction of the Cabinet. Mr. Baldwin explained that in the view of himself and his colleagues such an instruction was unconstitutional, as well as being subversive of the administration of justice and derogatory of the dignity of the Attorney-General's high office ; and with that opinion every lawyer will agree. Mr. MacDonald raised the matter in the House of Commons on the 18th instant by a question (which, with the answer, will be found on another page) which appeared clearly to indicate that the terms of the instruction in question went considerably beyond what his Government had intended, and Mr. Baldwin's reply, to the effect that where a contemplated prosecution involved matters of public policy, it was, or might be, the duty of the Attorney-General to inform himself of the views of the Government before coming to a decision, enabled Mr. MacDonald to say that that proposition was what his Cabinet had intended to express by its instruction. All's well that ends well : but it is certainly unfortunate that the view of the late Government was not more clearly expressed in the instruction. To say that before commencing a political prosecution, the Attorney-General must obtain the sanction of the Cabinet is to make the Government the responsible party, and to reduce Mr. Attorney to a mere ministerial officer in that regard; and we are glad to observe that Mr. MacDonald does not seek to support such a proposition. Sanction to do an act is one thing; the ascertainment by the Attorney-General by consultation of the views of those who may properly be consulted on questions of public policy is quite another. In the first case, the decision is, in fact, that of the person or body giving the 'sanction,' whilst in the second case, the decision is, as constitutionally it should be, that of the Attorney-General only, his mind having been informed, and his judgment possibly guided, by the opinions he has obtained on the question of the public policy of the action proposed to be taken.

—*The Law Journal,* 27th December, 1924, p. 799.

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Judges and Juries.—The days in which judges frequently came into conflict with juries are happily long since past, greatly to the advantage of the English justice, and to the dignity of its administration. It but very rarely happens now that a Judge finds it necessary to administer any form of rebuke to a jury as to the way in which its members perform their important duties, but such cases do occasionally occur,

and, no doubt, whilst human nature remains as it is, will continue to occur. In a recent running-down case involving a charge of manslaughter, the jury declared themselves unable to agree unless they visited the scene of the accident, and Mr. Justice Swift felt himself constrained, in discharging them from giving a verdict, to say that 'for twelve people, supposed to be intelligent, to say they cannot decide the truth about an accident which happened on a perfectly straight road without going to see the road, is the greatest rubbish I have ever heard.' This rebuke reminds one of the way in which that famous lawyer, and judicial wit, Mr. Justice Maule, once dealt with an obviously perverse verdict of 'Guilty' in a case in which the prisoner's innocence was apparent. 'Prisoner,' said that learned Judge, 'your counsel thinks you innocent, the prosecution think you innocent, and I think you innocent. But a jury of your fellow-countrymen, in the exercise of such common sense as God has given them, have found you guilty. I have therefore no alternative but to pass sentence. You will be imprisoned for a day, and, as that day was yesterday, you are free to go about your business.' In nine of such cases out of ten, the difficulty is caused by one or two wrong-headed or obstinate jurymen who manage either to persuade their fellows against their better judgment, or to force a disagreement. The extreme rarity with which such incidents occur is the best testimony to the general commonsense of the members of juries, and to the careful deliberation with which they discharge their highly important and often extremely difficult duties.

—*The Law Journal,* 27th December, 1924, p. 800.

BOOK REVIEWS.

THE INDIAN SUCCESSION ACT, Mazumdar, edited by Dr. M. Krishnamachariar. Messrs. R. Cambray & Co., Calcutta.

We have great pleasure in acknowledging the receipt of the commentaries on the Indian Succession Act designed by the late Mr. Mazumdar on the plan of his treatise on the Law of Hindu Wills. Mazumdar's book on *Hindu Wills* has acquired the reputation of being a first-rate treatise on the subject and the association of his name and that of Dr. Krishnamachariar who is familiar to us as a writer and editor of books on legal topics will themselves go a great way in

making it a success as a valuable treatise on the subject. The book is of particular value in the mofussil where the original English sources on the subject are not easily available. The work is a full and critical commentary on the Indian Succession Act giving reference to all the important decided cases and pointing out the differences between the English and the Indian law wherever necessary. We have no doubt that this work will find its place in the library of all those having to deal with the law on the subject.

THE SUBJECT INDEX TO INDIAN CASE-LAW, by Mr. T. G. Anantanarayana Aiyar, B. A., B. L., High Court Vakil.

We have great pleasure in acknowledging the receipt of Part I of *Subject Index to Indian Case-law* by Mr. T. G. Anantanarayana Aiyar, and published at Ernakulam. It is not easy at once to appreciate the merits of a publication which proposes to give in the shortest compass a bird's eye-view of the whole field of case-law. We should therefore wait to see the publication of the whole work to see whether the programme set before himself by the author has been achieved. It may be that the busy lawyer who has very little time to waste over the searching for the authorities may find some assistance from this book. We therefore look forward for the future parts of the book before we can confidently express our opinion on its value.

TRIAL OF ADOLF BECK, edited by Mr. E. R. Watson. Messrs. Butterworth & Co., Ltd., Calcutta.

We are in receipt of the *Trial of Adolf Beck* of the notable British Trials Series. We have referred to the value of these publications in reviewing other books of the same series and we do not therefore repeat here their merits. We would only add that this book maintains the high level of its predecessors in the series.

THE LAWYERS' COMPANION DIARY, 1925.

We have great pleasure in acknowledging the receipt of the *Lawyers' Companion Diary* for 1925.